IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 78-1875

GALE GREENBERG, *Respondent*

v.

DONALD LEE MCCABE, D.O., *Petitioner*

Reply to Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

LOUIS SAMUEL FINE
HARVEY L. ANDERSON
SARAH HOHENBERGER
Attorneys for Petitioner

FINE, STAUD AND GROSSMAN
1333 Race Street
Philadelphia, Pa. 19107
(215) 665-0100

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

Additional Statement of the Case

Certain statements in Respondent's Brief in Opposition require reply in order to place the case in its proper perspective and in order to focus on the real issues involved. Without belaboring all of the items involved, some will be commented on. Many of the items do not have legal significance. Others raised have a red-herring value, i.e., they are raised to avoid the legal issues in question. In her counter statement of the case Respondent asserts that Petitioner's counsel do not "allege or even imply that Mr. Joseph's representation was inadequate." (Respondent's Brief in Opposition, P. 2.) That statement is one such red-herring. Adequacy of representation is not the legal issue before this Honorable Court.[1] The question of right to

---

1. Petitioner does not concede that he was adequately represented at trial by Mr. Joseph. On the contrary, the affidavit of Jonathan Dunn indicates inadequacy in representation. A-11-A-12. In the case of *Aetna Life & Casualty Co. v. McCabe v. Greenberg* (E.D. Pa.), No. 78-598, Counsel for Petitioner therein, Jonathan Dunn, raises, in his Answer and Counter Claim, many questions concerning the conflict of interest between Dr. McCabe and Aetna. Therein he indicated that Aetna did not pursue avenues of defense such as those raised in his affidavit (A-11-A-12). Other items in the trial record could also be considered on this question:

a). Failure to object to admission of photographs of Mrs. Greenberg's children into evidence, where such pictures would have a severe emotional impact on the jury outweighing any probative value, and where some were not identified as to when taken or by whom, and where one picture was taken in 1964, showing a small child. Dr. McCabe did not meet Mrs. Greenberg until 1968.
(N.T. 3-19, 3-20.)

b). Failure to object to instruction on malpractice that gave the jury carte blanche to decide that anything it wanted was malpractice, that instruction stating:

counsel of one's choice is a clear and simple legal question not involving any detailed factual considerations. It was raised at trial and on appeal.

"There may be other grounds of malpractice, and, as I say, if there are, I hope that you will think of them." (N.T. 7-9.)

c). Failure to object to an instruction that a particular drug used by Dr. McCabe was an "illegal drug", where Dr. McCabe testified that he obtained the drug lawfully before there was any restriction on its use, and that he was lawfully permitted to utilize the amount he had on hand. (N.T. 7-30.)

Adequacy of representation requires a detailed analysis of the record and might require additional testimony. It is a separate and distinct issue from that of right to counsel. Adequacy of representation need not be considered in this case *unless* prejudice is required to be proven on the right to counsel issue. (See Petition for Writ of Certiorari, P.4, F.N. 4.) Even there, divergence in tactics is sufficient prejudice without consideration of adequacy of representation. (A-11-A-12; Petition for Writ of Certiorari, pp. 5-6.)

Reply

I.

Petitioner was denied his right to representation by counsel of his choice.

Counsel for Respondent, in his Brief in Opposition, appears to suggest the following reasons for denial of the Writ of Certiorari:

1) Not a strong enough factual basis in the record to consider the right to counsel issue;

2) Mr. Dunn had not appeared at pre-trial matters, though he had entered his appearance, and had, as his affidavit shows, discussed the case with insurer's counsel;

3) After the trial judge had ruled that Mr. Dunn has "no right to participate in effect in the case" (A-8) Mr. Dunn absented himself for the remainder of the trial, such absence constituting a waiver;

4) 1)-3) above, and failure of Dr. McCabe to voice any personal objection constituted a waiver;

5) The conflict of interest could be resolved in the Declaratory Judgment Action.

First, dealing with 1) above, the record shows: that Mr. Dunn presented the conflict of interest issue to the trial judge; that Mr. Dunn requested to be allowed to actively participate at trial; that he requested a ruling on the question; and that the trial judge ruled in clear, plain English that he could not participate in the case. That is a clear

factual basis. Further, the record shows that there was apparently some off-the-record discussion of this issue. Mr. Joseph refers to "the coverage problem which was raised earlier, sir." (A-8). At the beginning of the first day, Mr. Joseph referred to a letter which the insurer had sent to Dr. McCabe concerning limitation of coverage. He said it was being delivered to him at court but the record does not show that it was. (N.T. 1-1).[2] Whatever the extent of any off-the-record discussion of this matter, or the question of which letter Mr. Joseph was referring to (it could have been A-3 or A-5), it is clear that the issue was raised, presented to the Judge for a ruling, and that an adverse ruling was made. (A-7-A-9.)

The conflict of interest was spelled out for the trial judge unequivocally on the record. (A-7-A-9). Mr. Dunn, in fact only requested the right the Third Circuit recognized in *DiPrampero v. Fidelity & Casualty Co. of N.Y.*, 286 F.2d 367 (3rd Cir. 1961), the right to dual representation where a conflict exists, as here. Indeed, under *DiPrampero*, Mr. Dunn could not have excluded Mr. Joseph from full and independent representation, each attorney representing a distinct interest.

In his final statements in chambers Mr. Dunn reiterated his role as defending the uninsured interest of Dr. McCabe. His duty, in addition to defending against any liability, was to establish

2. This was not made a part of the Appendix. The discussion about the letter was sandwiched between other irrelevant matters, and was not a part of the trial judge's ruling. It is raised here only to show that there had already been discussion on the conflict of interest question both off-the-record and tangentially on-the-record before the final discussion and ruling at A-7-A-10.

that if there were liability such liability would be covered by the insurance policy. See *DiPrampero v. Fidelity & Casualty Co. of N. Y., supra.*

With respect to 2) above, Mr. Dunn was not required to have appeared at any pretrial matters. Nothing in the law prevented him from being active counsel only at trial.

With respect to 3) above, the failure to return on subsequent days of the trial, it should be noted that once the trial judge ruled he could not participate Local Rule 32(c), applying to voluntary absence of counsel *representing* a client, had no application. Indeed, if he had sat at counsel table that could have been construed as a waiver. Compare *LaRocca v. State Farm Mutual Automobile Insurance Co.* 329 F. Supp. 163 (W.D. Pa. 1971), aff'd, 474 F.2d 1338 (3rd Cir. 1973). (Individual counsel was present at trial, but did nothing on the record, which was an acquiescence to the conduct of the case by counsel for insurer).

With respect to 4) it should seem obvious that it would be inappropriate for Dr. McCabe to voice his personal objection when the ruling had already been made, and where he was not asked by the trial judge to state his desires. Clearly, a waiver here, where Petitioner had his personal counsel at trial, cannot be inferred from a silent record. In *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) this Honorable Court stated the rule that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights," and that for waiver to apply there must be shown "an intentional relinquishment or abandonment of a known right or privilege." Such a waiver of the right to counsel must appear on the record. *Johnson v. Zerbst, supra.* In analogous cases in the criminal area an

accused cannot waive his right to counsel at any stage of the proceedings, pre-trial, as well as at trial, without a specific colloquy on the record between the accused and the judge, magistrate, or arresting officer or interrogator, wherein the accused says he does not want counsel. *Miranda v. Arizona*, 384 U.S. 436 (1965); *United States v. Wade*, 388 U.S. 219 (1967). An accused cannot waive a jury trial without a written waiver signed by him or a colloquy on the record wherein the trial judge asks him if he makes such a waiver, during which time the judge advises him of his right. *Patton v. United States*, 281 U.S. 276 (1930); *United States v. Hooper*, 576 F.2d 1382 (9th Cir. 1978). Such a waiver of a constitutional right must be strictly construed even in a civil case. *Burnham v. North Chicago Street Ry. Co.*, 88 F. 627 (7th Cir. 1898); *F.M. Davis & Co. v. Porter*, 248 F. 397 (8th Cir. 1918); *United States v. Lee*, 539 F.2d 606, 609 (6th Cir. 1976).

With respect to 5), the question of conflict of interest cannot be resolved in the Declaratory Judgment Action. The insurer had the right to have its counsel present to actively represent the Petitioner to the extent of its insured interest. *DiPrampero v. Fidelity & Casualty Co. of N. Y., supra.* The insured, Petitioner, had the right to have his own independent counsel present to represent his uninsured interest. *DiPrampero v. Fidelity & Casualty Co. of N.Y., supra.* The insurer was also prejudiced by the ruling. The insurer's counsel, Mr. Joseph, did not desire the ruling. Hence, on this issue, there is no redress absent review in *this* case.

II.

The Petitioner was denied his right to representation of counsel of his choice under the Fifth Amendment and Pennsylvania law.

Here, counsel for respondent makes the following arguments:

1) The Fifth Amendment ground of the denial of counsel question was not expressly argued in the Court of Appeals;

2) the denial of the right under Pennsylvania law is not established in an all-fours case where the issues is raised in the original tort case, as is done herein;

3) the local rules give the trial judge discretion to limit cross-examination and summation to one attorney.

With respect to 1) above, there are three answers:

a) The right to representation by counsel of one's choice is a right of inherently constitutional dimensions, and is implicit in the issue, whether or not articulated as such;

b) In *Giordenello v. United States*, 357 U.S. 480, 484 (1958), this Honorable Court considered an issue based on two constitutional grounds, where only one of the grounds was urged below. See also *Sabbath v. United States*, 391 U.S. 585, 588, N.1 (1968); *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 214 (1951);

c) Finally, where the issue is a significant, constitutional question this Honorable Court may consider it, whether or not raised below. *Brotherhood of Carpenters v. United*

States, 330 U.S. 395, 412 (1947); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 16 (1941);

In the cases cited by respondent, *California v. Taylor*, 353 U.S. 553, 556, N.2 (1957), and *Lawn v. United States*, 355 U.S. 339, 362 N.16 (1958), the parties sought to raise issues not raised in the petition for writ of certiorari, and the issues sought to be raised were not related to the granted issues, rendering them inapplicable to the instant case.

With respect to 2) above, it should be noted that in *Nichols v. American Casualty Co.*, 423 Pa. 480, 225 A.2d 80 (1966) the Pennsylvania Supreme Court clearly stated the rule urged by Petitioner, that he had a right to independent counsel:

> " . . . Defendant subsequently advised plaintiffs to retain counsel of their choice to represent their interests in the event that there should be a judgment in excess of the insurance coverage. *Plaintiffs did retain private counsel, who together with the attorney supplied by defendant, represented them at trial and on appeal before this Court* . . .
>
> * * * * *
>
> A case much on point is *DiPrampero v. Fidelity and Casualty Co. of New York*, 286 F.2d 367 (3d Cir. 1961). . . . The insurer had advised the insured that it was questionable whether or not the accident was within coverage of the policy and that it would, nevertheless, undertake to defend him, but only to the extent of the insured interest. *The insured elected to retain for the defense of his uninsured interest the lawyer employed by the insurance company to represent him on the insured interest*. . . . [T]he insurer denied coverage under the policy. Affirming a judgment for the insurance carrier, the Third Circuit held that the insured did not suffer injury at the hands of the insurance company or its attorney, who in no way sacrificed the uninsured interest. Since there was no prejudice to the insured in *DiPrampero, where one counsel represented the insured in two capacities*, there can be no prejudice in the instant case where the plaintiffs obtained private counsel. Despite our recognition in *Gedeon v. State Farm Mutual Automobile Insurance Company*, 410 Pa. 55, 188 A.2d 320 (1963), that the obligation to indemnify is separate from the obligation to defend, the more cautious practice is that even where there is absent the possibility of a verdict in excess of the policy limits, if an insurance carrier is contemplating refusing to indemnify it should advise the insured to secure competent counsel of his choice. In the instant case, the carrier, by following this practice, avoided the risk that the insured might suffer injury by reason of being denied insurance coverage after trial or settlement, *at which he was not represented by his own counsel*. . . ."
> (Emphasis added).

It would be difficult to have a more clear exposition of the right to independent counsel by an insured.

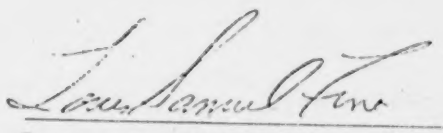
This pronouncement by the Pennsylvania Supreme Court, whether considered dicta or a clear holding, must be considered as the definitive determination of Pennsylvania law. *Doucet v. Middleton*, 328 F.2d 97 (5th Cir. 1964); *Curtis Publishing Co. v. Cassel*, 302 F.2d 132 (10th Cir. 1962); *Hartford Acc. & Indemnity Co. v. First Nat. Bank & Trust Co. of Tulsa*, 287 F.2d 69 (10th Cir. 1961); *United States Fidelity & Guaranty Co. v. Anderson Constr. Co.*, 260 F.2d 172 (9th Cir. 1958); *Hardy Salt Co. v. Southern Pac. Transp. Co.*, 501 F.2d 1156 (10th Cir. 1974);

Boynton v. Ryan, 157 F. Supp. 324 (E.D. Pa. 1958), aff'd, 257 F.2d 70 (3rd Cir. 1958). A clear statement of the law must be accepted. *Boynton v. Ryan*, supra. See *Brink's Inc. v. Hoyt*, 179 F.2d 355 (8th Cir. 1950) (When State Court has not passed on the exact question the considered dictum of the State's highest court should not be ignored). The *right* to individual representation is no right at all if the trial court may blithely ignore it when it is raised by individual counsel.

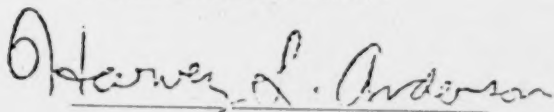
With respect to 3) above, concerning Local Rule 33(a), that rule of discretion does not apply where its application would violate the constitutional right to counsel of one's choice or a right guaranteed by state law required to be honored under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

Conclusion

WHEREFORE, Petitioner prays that this Honorable Court grant the Petition for Writ of Certiorari.



LOUIS SAMUEL FINE



*HARVEY L. ANDERSON

SARAH HOHENBERGER

FINE, STAUD AND GROSSMAN

Attorneys for Petitioner